IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DENNIS JOHN CAMPBELL and MINDY JAYE ZIED-CAMPBELL	**:**	**CIVIL ACTION**
	:	
	:	**NO. 01-CV-4517**
v.	**:**	
	:	
JOHN E. POTTER, POSTMASTER GENERAL and THE UNITED STATES POSTAL SERVICE	**:**	

MEMORANDUM AND ORDER

Kauffman, J. **October 17 , 2005**

Dennis John Campbell ("Campbell") and Mindy Jaye Zied-Campbell ("Zied-Campbell") (collectively, "Plaintiffs") bring this action for "violations of the Federal Rules of Civil Procedure" (Count One), violations of the Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq. (Counts Two, Three, Six, Seven, and Ten through Thirteen), violations of the California Labor Code (Count Four), defamation (Count Five), violations of Due Process rights (Count Eight), invasion of privacy (Count Nine), civil conspiracy (Count Fourteen), loss of consortium (Count Fifteen), and intentional infliction of emotional distress (Count Sixteen) against Defendants John E. Potter, Postmaster General, and the United States Postal Service (collectively, "Defendants"). Now before the Court is Defendants' Motion to Dismiss.[1] For the reasons that follow, Defendants' Motion will be granted.

I. BACKGROUND

Accepting the factual allegations of Plaintiffs' Second Amended Complaint ("Complaint") as true and drawing all inferences in Plaintiffs' favor, the facts pertinent to

[1] Defendants have moved to dismiss all counts of the Second Amended Complaint with the exception of Count Three, which is Plaintiffs' claim based on derogatory employment references.

Defendants' Motion are as follows.[2] Campbell began work for Defendant United States Postal Service in September 1971 as a distribution clerk in Fort Lauderdale, Florida. He continued in that position until he resigned in January 1986. Complaint ¶¶ 65-92. Two months later, Campbell rejoined the United States Postal Service in Landsdale, Pennsylvania. Id. ¶¶ 93. Soon thereafter, he was accused of stealing a postal registry pouch. Id. ¶¶ 116-30. Although the accusation was never corroborated, Campbell claims that he suffered harassment at the hands of his co-workers, who tried to link him to the theft. Id. ¶¶ 131-42.

Campbell was terminated from the Landsdale Post Office in May 1986. The reasons given for the dismissal were "poor attendance" and "unsatisfactory work performance." Id. ¶¶ 179-82. During the period of unemployment that followed, Campbell visited a psychologist, who diagnosed him with both Post-Traumatic Stress Disorder and Acute Paranoid Disorder. Id. ¶¶ 212, 423. Campbell's condition did not, however, keep him from seeking reinstatement. He protested his dismissal on a number of fronts, including his union and his representatives in Congress. Id. ¶¶ 182-92. Those efforts ultimately proved successful and Campbell was allowed to return to work at the Landsdale Post Office in October 1987. Id. ¶ 241.

However, the harassment Campbell had experienced prior to his termination continued and in October 1989, he secured a transfer to the neighboring post office in Hatfield, Pennsylvania, where he was assigned to the position of City Carrier. Id. ¶ 264. In 1991, Campbell's disability resurfaced and he left work on approved sick-leave. Id. ¶¶ 293-304. After approximately two months of his sick-leave, the Hatfield Postmaster insisted that Campbell

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[2] The summary of facts that follows is not comprehensive. It is limited to the facts essential to the Motion before the Court, and thus omits many of the details asserted in Plaintiffs' Second Amended Complaint, which consists of 993 numbered paragraphs.

return to work. Id. ¶ 332. On his first day back, Campbell was ordered to perform duties involving driving, despite his protests that he was taking medications that might impair his driving ability. Id. ¶¶ 340-42. Several days later, Campbell quit his position at the Hatfield Office because he had not been given the accommodation he required. Id. ¶¶ 355-58. In the years following Campbell's departure from the Hatfield office, prospective employers have contacted Defendants to inquire as to his job performance. In response, Defendants have made derogatory comments, effectively preventing him from finding new work. Id. ¶¶ 396-405.

II. PROCEDURAL HISTORY

The original complaint in this case was filed pro se on December 3, 2001. Plaintiffs subsequently obtained counsel and filed an Amended Complaint on December 2, 2003.[3] Defendants then filed a timely Motion to Dismiss, which the Court granted on December 10, 2004 without prejudice and with leave to amend in order to correct the defects in the First Amended Complaint, if possible. Campbell v. Potter, No. 01-4517 (E.D. Pa. Dec. 10, 2004). Plaintiffs filed their Second Amended Complaint pro se on February 15, 2005. Defendants subsequently filed the Motion to Dismiss that is now before the Court.

III. THE NEW CAUSES OF ACTION IN THE SECOND AMENDED COMPLAINT

In Counts One, Four, Five, Eight, Nine, Fourteen, Fifteen and Sixteen, Plaintiffs assert totally new claims, which clearly exceed the scope of the Court's grant of leave to amend. These new claims will therefore be dismissed without prejudice. In fairness, Plaintiffs must file a motion to amend pursuant to Fed. R. Civ. P. 15(a), seeking leave to add these new claims.

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[3] Campbell was the only Plaintiff in the First Amended Complaint. The Second Amended Complaint adds Zied-Campbell as an additional plaintiff.

The analysis of Defendants' Motion to Dismiss will therefore be limited to Counts Two, Three, Six, Seven, and Ten through Thirteen**,** which fall within the scope of the leave to amend granted by the Court in its December 10, 2004 Order.

IV. LEGAL STANDARD

When deciding a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court may look only to the facts alleged in the complaint and its attachments. Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994). The Court must accept as true all well-pleaded allegations in the complaint and view them in the light most favorable to the plaintiff. Angelastro v. Prudential-Bache Sec., Inc., 764 F.2d 939, 944 (3d Cir. 1985). A Rule 12(b)(6) motion will be granted only when it is certain that no relief could be granted under any set of facts that could be proved by the plaintiff. Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988).

V. ANALYSIS

Counts Two, Three, Six, Seven, and Ten through Thirteen attempt to assert claims under the Rehabilitation Act of 1973, which provides a private cause of action to handicapped individuals who have suffered from discrimination at the hands of the federal government and its agencies. See Spence v. Straw, 54 F.3d 196, 199 (3d Cir. 1995). However, before bringing such an action, a prospective plaintiff must first timely exhaust all available administrative remedies. Id. at 201. Failure to do so renders the plaintiff's claim defective, and thus susceptible to a motion to dismiss. See Weber v. Henderson, 2001 WL 285605 at * 3 (E.D. Pa. 2001) (citing Robinson, 107 F.3d 1018, 1022 (3d Cir. 1997)).

In this case, the relevant administrative remedies under the Rehabilitation Act derive from

42 U.S.C. § 2000e-16 ("Title VII"). See Spence, 54 F.3d at 201. The applicable regulations require aggrieved persons to (1) initiate contact with an EEOC counselor within 45 days of the alleged discriminatory conduct; and (2) file a formal EEOC complaint within 15 days after being informed by the EEOC Counselor that the grievance has not been resolved. 29 CFR § 1614.105 (2004).

With the exception of Count Three, Plaintiffs have failed to allege that Campbell contacted an EEOC Counselor within 45 days of the alleged discriminatory conduct.[4] Plaintiffs, however, contend that even if they did not contact the EEOC within the applicable time limit, their action should be allowed to proceed based on the doctrine of equitable tolling.[5] Accordingly, the analysis will now turn to whether Plaintiffs are entitled to have the statutory time limits for contacting the EEOC equitably tolled.

Because the equitable tolling analysis goes beyond the face of the pleadings, the Court must treat "the issue of equitable tolling in a manner consistent with Rule 56 for summary judgment." Robinson, 107 F.3d at 1022 (3d Cir. 1997). In deciding a motion for summary judgment pursuant to Fed. R. Civ. P. 56, the test is "whether there is a genuine issue of material

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[4] Defendants do not challenge that Campbell timely contacted the EEOC to complain about the derogatory employment references that form the basis of Count Three. Complaint ¶ 693.

[5] Plaintiffs suggest that the various acts of discrimination they have identified constitute one continuous violation, and that their communication with the EEOC counselor in 1996 consequently satisfies the exhaustion requirement for all the discriminatory conduct alleged in the Complaint. However, Plaintiffs have failed to point to any facts in the record showing that the conduct giving rise to this action, which spans fourteen years and three post offices is "'more than the occurrence of isolated or sporadic acts of intentional discrimination.'" West v. Philadelphia Elec. Co., 45 F.3d 744, 754 (3d Cir. 1995) (quoting Jewett v. Int'l Tel. and Tel. Corp., 653 F.2d 89, 91 (3d Cir. 1981)).

fact and, if not, whether the moving party is entitled to judgment as a matter of law." Med. Protective Co. v. Watkins, 198 F.3d 100, 103 (3d Cir. 1999) (quoting Armbruster v. Unisys Corp., 32 F.3d 768, 777 (3d Cir. 1994)). However, "there can be 'no genuine issue as to any material fact' . . . [where the non-moving party's] complete failure of proof concerning an essential element of [its] case necessarily renders all other facts immaterial." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

In a motion for summary judgment, the moving party has "the initial burden of identifying evidence which it believes demonstrates the absence of a genuine issue of material fact." Childers v. Joseph, 842 F.2d 689, 694 (3d Cir. 1988) (citing Celotex Corp. v. Catrett, 477 U.S. 317 (1986)). If the moving party makes this initial showing, and the nonmoving party has the burden of persuasion (as Plaintiffs do in this case), the onus then shifts to the nonmoving party "to identify those facts of record which would contradict the facts identified by the movant." Id. at 694-95 (citing First Nat'l Bank of Pa. v. Lincoln Nat'l Life Ins. Co., 824 F.2d 277, 282 (3d Cir. 1987)). If the nonmoving party fails to meet this burden – if, in other words, it fails to point to evidence contradicting the moving party's evidence – then no genuine issue of fact exists and summary judgment is appropriate. Id.

The plaintiff bears the burden of demonstrating that equitable tolling is warranted. Parker v. Royal Oak Entm't, 2004 WL 23101851, at *2 (3d Cir. 2003). That burden is significant, as the doctrine of equitable tolling must be applied sparingly. Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95 (1999). In Oshiver v. Levin, Fishbein, Sedran, & Berman, the Third Circuit described three situations in which equitable tolling *may* be appropriate: "(1) where the defendant has actively misled the plaintiff respecting the plaintiff's cause of action; (2) where

the plaintiff in some extraordinary way has been prevented from asserting his or her rights; or, (3) where the plaintiff has timely asserted his or her rights mistakenly in the wrong forum." Oshiver, 38 F.3d 1380, 1387 (3d. Cir. 1994). However, the presence of one of these situations is not itself sufficient grounds for equitable tolling. A plaintiff seeking relief under the equitable tolling doctrine must ultimately show that he exercised due diligence in defending his legal rights and that despite that due diligence, one of the circumstances described in Oshiver prevented him from timely exhausting his administrative remedies. Irwin, 498 U.S. at 95 (1999); Robinson, 107 F.3d at 1023 ("Running throughout the equitable estoppel cases is the obligation of the plaintiff to exercise due diligence to preserve his or her claim.").

Here, Plaintiffs argue that all three of the Oshiver situations apply. See Plaintiffs' Opposition to Motion to Dismiss ("Plaintiffs' Opposition") at 63. With regard to the first, Plaintiffs have alleged that Defendant United States Postal Service has perpetrated numerous frauds against them. However, none of the alleged frauds misled Plaintiffs from bringing their claims before the EEOC. Accordingly, the deceptive conduct Plaintiffs have alleged does not warrant equitable tolling. See Podobnik v. United States Postal Service, 409 F.3d 584, 591 (3d Cir. 2005) (finding equitable tolling unwarranted because plaintiff's "noncompliance with the ... statute of limitations period was not the result of [his] being misled by the USPS.").

Plaintiffs next contend that Campbell's mental illness is an "extraordinary circumstance," which prevented him from "determin[ing] that he was being discriminated against due to his disability." Plaintiffs' Opposition at 64. The record establishes otherwise. The Complaint documents numerous instances in which Plaintiffs protested Defendants' alleged discriminatory conduct. Indeed, Campbell's illness did not deter him from lodging complaints with the Merit

Systems Protections Board, his collective bargaining unit, the National Labor Relations Board, the Office of Personnel Management, various Congressmen, Senators, the President of the United States, and numerous Postmasters General. These complaints, which all were based on Campbell's belief that he had been discriminated against, clearly refute his contention that his mental illness prevented him from "determin[ing] that he was being discriminated against due to his disability." There is therefore no genuine issue of fact as to whether Campbell's mental illness clouded his awareness of the alleged discrimination.[6] Accordingly, the Court finds that Plaintiffs are not entitled to equitable tolling based on Campbell's mental illness.

Finally, Plaintiffs argue that Campbell mistakenly sought relief in fora other than the EEOC. Plaintiffs' Opposition at 64. As noted above, there is no question that Campbell sought to redress his discrimination claims through channels other than the EEOC. However, numerous courts have made clear that the mere pursuit of relief other than that prescribed by the statute is not itself sufficient grounds for equitable tolling; rather, the plaintiff must also show that due diligence would not have uncovered the statutorily-required administrative steps. See, e.g., Int'l Union of Elec. Radio and Machine Workers, AFL-CIO, Local 790 v. Robbin & Myers, Inc., 429 U.S. 229 (1976) (existence and utilization of collective bargaining grievance procedures does not toll running of statute of limitation period for filing EEOC claim); Sharpe v. Philadelphia Hous. Auth., 693 F.2d 24 (3d Cir. 1982) (participation in the internal administrative appeal process did not toll ADEA filing requirements); Peter v. Lincoln Technical Inst., 255 F. Supp. 2d 417, 426-29 (E.D. Pa. 2002) (employee's filing of charge under FMLA with Department of Labor did not

[6] Tolling would not be warranted in any event. Hedges v. United States, 404 F.3d 744, 753 (3d Cir. 2004) (noting that "mental incompetence, even rising to the level of insanity, does not toll a federal statute of limitations for claims against the Government.").

equitably toll limitations period for ADA claim). Plaintiffs have failed to demonstrate that they exercised due diligence in pursuing their claims in the statutorily prescribed manner. Accordingly, the Court finds that Plaintiffs are not entitled to equitable tolling based on the relief they mistakenly sought in fora other than the EEOC.

VI. CONCLUSION

For the foregoing reasons, the Court finds that Plaintiffs have failed to exhaust their administrative remedies in a timely fashion for their Rehabilitation Act claims with the exception of the claim asserted in Count Three. Counts Two, Six, Seven, and Ten through Thirteen will therefore be dismissed. Counts One, Four, Five, Eight, Nine, Fourteen, Fifteen and Sixteen, which exceed the scope of the Court's grant of leave to amend, will be dismissed without prejudice. An appropriate order follows.

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ORDER

AND NOW, this __17th____ day of October, 2005, upon consideration of Defendants' Motion to Dismiss (docket no. 29) and for the reasons stated in the accompanying Memorandum, it is **ORDERED** that the Motion is **GRANTED**. It is **FURTHER ORDERED** that

(1) Counts One, Four, Five, Eight, Nine, Fourteen, Fifteen and Sixteen are **DISMISSED WITHOUT PREJUDICE**;

(2) Counts Two, Six, Seven, and Ten through Thirteen are **DISMISSED**.

BY THE COURT:

S/ BRUCE W. KAUFFMAN
BRUCE W. KAUFFMAN, J.